

STATE OF MICHIGAN
COURT OF APPEALS

RACHELLE ANN BACHRAN,

Plaintiff-Appellee,

v

LANCE WILLIAM BACHRAN,

Defendant-Appellant.

UNPUBLISHED
February 28, 2003

No. 226937
Houghton Circuit Court
LC No. 96-009565-DM

ON REMAND

Before: Holbrook, Jr., P.J., and Cavanagh and Meter, JJ.

PER CURIAM.

In *Bachran v Bachran*, unpublished per curiam opinion of the Court of Appeals, issued August 21, 2001 (Docket No. 226937), we affirmed the judgment of divorce with regard to the trial court's distribution of defendant's pension, reversed with regard to the distribution of the parties' premarital mutual funds and individual retirement accounts (IRAs), and remanded the matter back to the trial court on the issue of plaintiff's right to survivorship benefits. In response to defendant's application for leave to appeal, our Supreme Court vacated our judgment "as it pertains to the distribution of pension benefits that accrued before the marriage and after the divorce," and remanded the matter to this Court for reconsideration in light of *Reeves v Reeves*, 226 Mich App 490; 575 NW2d 1 (1997) and MCL 552.18(1). *Bachran v Bachran*, 653 NW2d 405 (2002). On reconsideration of the issue whether plaintiff is entitled to one-third of defendant's total military pension, we remand this matter to the trial court for further factual findings and for a determination of the value of the pension.

Defendant claims that the trial court erred in granting plaintiff an inequitable one-third of his military pension "for 28 years of service," because they were only married for eight and one-half years. On appeal, we review the trial court's findings of fact for clear error and, if upheld, determine whether the dispositive ruling was fair and equitable in light of those facts. *McMichael v McMichael*, 217 Mich App 723, 728-729; 552 NW2d 688 (1996).

Pension benefits may be considered part of the marital estate for purposes of property division. MCL 552.18(1); *Magee v Magee*, 218 Mich App 158, 164; 553 NW2d 363 (1996); *Boonstra v Boonstra*, 209 Mich App 558, 563; 531 NW2d 777 (1995). Here, defendant's pension began to accrue on June 3, 1973, and his rights in the pension vested on June 3, 1993. The parties were married in August of 1988, and the judgment of divorce was entered on May 7, 1998. Consequently, the parties had been married for almost ten years, and defendant had been in the military for almost twenty-five years, at the time of divorce.

The issue presented here is whether plaintiff was granted an inequitable portion of defendant's pension benefits. Pursuant to MCL 552.18(1), "[a]ny rights in and to vested pension . . . payable to or on behalf of a party on account of service credit accrued by the party during marriage shall be considered part of the marital estate subject to award by the court under this chapter." By the plain language of MCL 552.18(1), the portion of the pension that accrued during the marriage must be considered part of the marital estate. Here, the trial court determined that, at the time of trial, defendant "had accumulated twenty-three and one half years of military service which would be credited for retirement purposes," eight and one-half of which accrued during the marriage. Accordingly, pursuant to MCL 552.18(1), approximately one-third of the value of defendant's pension, at the time of the divorce, was subject to distribution as part of the marital estate. See, also, *Vander Veen v Vander Veen*, 229 Mich App 108, 111-113; 580 NW2d 924 (1998). In effect, the portion of defendant's pension benefits that accrued before and after the marriage constituted a separate asset in defendant's separate estate. See *Reeves*, *supra* at 494.

However, the trial court awarded plaintiff "one-third of Defendant's total military retirement benefits available to him at the time of his retirement," instead of one-sixth of the value of defendant's pension at the time of the divorce. Because the trial court invaded defendant's separate estate by awarding plaintiff more than her congruent share of defendant's pension benefits, we remanded the matter back to the trial court for reconsideration and explanation since "a spouse's separate estate can be opened for redistribution when one of two statutorily created exceptions is met." See *Reeves*, *supra*.

As this Court discussed in *Reeves*, one of the statutory exceptions to the doctrine of noninvasion of separate estates is MCL 552.23(1), which provides that invasion may be permitted if, after the division, "the estate and effects awarded to either party are insufficient for the suitable support and maintenance of either party" *Reeves*, *supra*, quoting MCL 552.23(1). The second statutory exception, provided by MCL 552.401, that allows for invasion of a separate estate is when the other spouse "contributed to the acquisition, improvement, or accumulation of the property." *Reeves*, *supra* at 494-495, quoting MCL 552.401. Here, it is clear from the trial court's opinion on remand that it found the second exception applicable to this matter, i.e., plaintiff contributed to the improvement of defendant's pension plan through the provision of household and family services to her economic and professional disadvantage. See *Bachran v Bachran*, unpublished per curiam opinion of the Court of Appeals, issued August 21, 2001 (Docket No. 226937), p 2. After additional review on remand we, again, cannot conclude that the trial court's findings of fact are clearly erroneous. See *Hanaway v Hanaway*, 208 Mich App 278, 293-294; 527 NW2d 792 (1995).

Next, we consider whether the dispositional ruling leaves this Court with the firm conviction that, in light of the facts and circumstances, the distribution was unfair or inequitable. See *Sands v Sands*, 442 Mich 30, 34; 497 NW2d 493 (1993); *McMichael*, *supra*. Here, the trial court awarded plaintiff "one-third of Defendant's total military retirement benefits available to him at the time of his retirement." Consequently, as already discussed, the trial court awarded plaintiff a portion of defendant's pension benefits that accrued before and after the marriage.

It is well established that pension benefits accrued before and after marriage may be subject to distribution depending on the equities of the circumstances presented. MCL 552.401; *Boonstra*, *supra*; *Booth v Booth*, 194 Mich App 284, 291; 486 NW2d 116 (1992), modified on

other grounds by *Eddie v Eddie*, 201 Mich App 509, 512; 506 NW2d 591 (1993). The rationale for permitting the distribution of such pension benefits is that “[t]he major consideration is the security of the family and the court may utilize any property in the real and personal estate of either party to achieve suitable support for the family” *Booth, supra* at 290, quoting *Rogner v Rogner*, 179 Mich App 326, 329-330; 445 NW2d 232 (1989). Consequently, in determining the equitable distribution of property several factors, when relevant, should be considered, including (1) the length of the marriage, (2) contributions to the marital estate, (3) ages, (4) health, (5) life status, (6) necessities and circumstances, (7) earning abilities, (8) past relations and conduct, and (9) general principals of equity. See *Sparks v Sparks*, 440 Mich 141, 159-160; 485 NW2d 893 (1992). Disproportionate weight should not be assigned to any one factor or circumstance. *Id.* at 158.

In this case, the trial court determined that invasion of defendant’s separate estate was appropriate, i.e., that plaintiff was entitled to a portion of the pension benefits that accrued before and after the marriage. However, the trial court neither articulated which *Sparks* or other equity factors were relevant, nor indicated the value of the pension that it was distributing. See *Sparks, supra* at 159; *McNamara v Horner*, 249 Mich App 177, 188-189; 642 NW2d 385 (2002); *Magee, supra* at 165. In light of the significant assets that existed in the marital estate, as well as the apparent young age, good health, and earning abilities of the parties, it is unclear how the trial court arrived at its decision to award plaintiff the entire marital portion of the pension, plus some of defendant’s portion of that pension. That plaintiff established one of the exceptions to the doctrine of noninvasion of separate estates, i.e., her entitlement, is a different issue than what constitutes a fair and equitable distribution of that disputed asset. Here, we are unable to determine whether the distribution of defendant’s military pension was fair and equitable—that, considering plaintiff’s income, needs, age, health, life status, or any other equitable circumstances, an award without defendant’s portion of the pension would be insufficient. Therefore, we remand this matter to the trial court for further factual findings and for a determination of the value of the pension.

Remanded. The trial court is directed to render its written decision in this matter within 35 days from the release of this opinion and forward its decision to this Court within seven days after entry. Any transcript of proceedings on remand shall be prepared and filed with this Court within 14 days after completion of the proceedings. This Court retains jurisdiction.

/s/ Donald E. Holbrook, Jr.
/s/ Mark J. Cavanagh
/s/ Patrick M. Meter